*THE HON'BLE SRI JUSTICE C.V. NAGARJUNA REDDY

+WRIT PETITION No.33311 of 1998

%Dated 19-09-2007

#B.Ramulu

… Petitioner

VERSUS

$The Presiding Officer,
Labour Court-II,
Hyderabad.
And another

… Respondents

! Counsel for Petitioner : Sri V.Narsimha Goud

^Counsel for Respondent No.1 : Sri V.Padmanabha Rao

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? Cases referred

1. (2007) 2 SCC 433

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Between:
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Counsel for the Petitioner : Sri V.Narsimha Goud.

Counsel for the respondent No.1: Sri V.Padmanabha Rao.

THE HON'BLE SRI JUSTICE C.V. NAGARJUNA REDDY

WRIT PETITION No.33311 of 1998

ORDER:-

This writ petition is filed for a writ of certiorari to quash the award dated 10.1.1997 in I.D.No.94 of 1995 on the file of Labour Court-II, Hyderabad to the extent of denial of back wages to the petitioner for the period during which he was out of service.

The brief facts which are necessary for the disposal of the writ petition may be stated as under:

The petitioner joined respondent No.2 Corporation as Driver in the year 1988 and his services were regularized in the year 1989. While the petitioner was on duty driving the bus bearing No.AEZ 2173 of Siddipet depot, it has capsized resulting in causing of injuries to 27 passengers travelling in the bus. This has led to initiation of disciplinary proceedings against the petitioner. Two charges were framed against him, which are reproduced hereinbelow:

> "1. For having driven the vehicle No.AEZ 2173 of Siddipet depot in a negligent manner without taking precautionary measures and without anticipation, resulting in the capsize of the vehicle in the fields by the side of the road, causing injuries to 27 passengers of the bus, which amounts to misconduct under Reg.No.28 (ix)(a) and (b) of APSRTC

Employees (Conduct) Reg.1963.

2. For having driven the vehicle No.AEZ 2173 of Siddipet depot in a negligent manner without precautionary measures and without anticipation which resulted in capsize of the vehicle in the fields by the side of the road, causing extensive damages to the vehicle No.AEZ 2173 which amounts to misconduct under Reg.No.28 (ix) (a) and (b) of APSRTC Employees (Conduct) Reg.1963."

The petitioner submitted his explanation and not satisfied with the same, an enquiry was conducted against him. Based on the enquiry report in which the petitioner was found guilty of both the charges, respondent No.2 passed an order on 24.12.1995 removing the petitioner from service. The petitioner then filed an appeal before the Divisional Manager, Sangaredy Division and was unsuccessful in his appeal as the same was rejected by the appellate authority, by its order dated 20.6.1995. The petitioner then approached Labour Court-II, Hyderabad (respondent No.1) by way of I.D.No.94 of 1995 questioning the said two orders. Respondent No.1 by its award dated 10.1.1997 (wrongly mentioned in the certified copy of the award as 10.1.1998) set aside the order of removal of the petitioner and directed his reinstatement with all benefits like continuity of service etc., but without any back wages. While the Corporation has not questioned this award and instead, reinstated the petitioner, the latter filed the present writ petition questioning the award to the extent that he was denied back-wages during the period between 24.12.1995 and 28.8.1997, i.e., the period during which he was out of service.

Heard Sri V.Narsimha Goud, learned counsel for the petitioner and Sri V.Padmanabha Rao, learned counsel representing the Standing Counsel for the Corporation.

The learned counsel for the petitioner contended that the Labour Court having found in unequivocal terms that the bus capsized due to existence of loose soil and not due to any lapse on the part of the petitioner, was totally unjustified in denying back wages to the

petitioner.

Per contra, the learned counsel for respondent No.2 – Corporation submitted that the Labour Court has exercised its discretion vested in it under Section 11-A of the Industrial Disputes Act 1947 and therefore, the award passed exercising such a discretion is not liable to be interfered with.

I have given serious consideration to the respective submissions of the learned counsel and perused the record.

The Labour Court while reversing the orders passed by the disciplinary and appellate authorities held as under:

> " The final arguments were heard as regards the proportionality of the quantum of punishment awarded to the petitioner. It is to be seen that the charge of rash and negligent driving by the petitioner besides lacking the power of anticipation and without taking precautionary measures the bus was driven by the petitioner on 9.6.1994 thereby involved in the accident resulting in injuries to some persons and damage to the bus, the petitioner pleaded in his defence that there was no rash and or negligence on his part and that while he was driving the bus on the relevant date when he reached near the place of accident he found a tractor coming in the opposite direction loaded with bushes as such he turned his bus towards left applying brakes suddenly. As a result the bus has fell into nearby the fields below and that he was driving the bus at a low speed of 35 KM., per hour, and that there was light raining on the day. It is also pleaded that the mud of the road was very loose and the said road was almost covered with loose soil and as such when he applied brakes it slipped and capsized as such there was no fault on his part. The said plea was not accepted by the Enquiry Officer as well as by the respondent. **It is seen from the statement of the witnesses like service conductor, the traffic supervisor and others that the bus was loaded with 62 passengers at that time and that the bus was capsized due to the road being covered by loose soil only and not due to any lapse on the part of the driver/petitioner and the bus was only at a speed of 35 km., per house.**" (emphasis added)

Having given categorical finding that capsizing of bus was not

on account of the fault of the petitioner, respondent No.1 very strongly invoked the doctrine of proportionality in the immediately following paragraph of the award. In my considered view the question of application of the doctrine of proportionality does not arise in a case where an employee is fully exonerated of the charges. It is only in cases where the employee is found guilty of one or more of the charges and the Court/Tribunal find that the penalty imposed on the employee is shockingly disproportionate to the gravity of misconduct proved that the doctrine of proportionality could be invoked. Therefore, the whole approach of the Labour Court in invoking the doctrine of proportionality and disallowing back-wages to the petitioner cannot be sustained at all. When once an employee is held not guilty of the charges framed against him and he is directed to be reinstated, ordinarily it should follow that he is entitled to all the attendant benefits including back-wages. It should be deemed that the punishment which is set aside on the finding of his not being found guilty was never suffered by him. On this premise, denial of back-wages in the instant case is wholly unjust.

The law is well settled that in the cases of reinstatement an employee is not entitled to back-wages if it is shown that during the period when the employee was out of employment he was gainfully employed. In the affidavit filed in support of the writ petition, the petitioner categorically averred that from 24.12.1995 to 28.8.1997 he remained unemployed and despite his best efforts he could not secure reemployment. Respondent No.2 has not even filed a counter affidavit controverting this specific averment made by the petitioner.

Learned counsel for the respondents referred to the judgment of the Supreme Court in **J.K.Synthetics Ltd., Vs. K.P.Agrawal and Another**[1]. I have carefully gone through the said judgment and on the facts of this case, the said judgment has no application. In the case decided by the Supreme Court while the employee was exonerated of charge No.1 he was found guilty of charge No.2 and

was found entitled to benefit of doubt on charge No.3. On those set of facts, the Supreme Court having reviewed the entire case law decided the said case against the employee. However, it is apt to extract para-18 of the said judgment:

> "Coming back to back wages, even if the court finds it necessary to award back wages, the question will be whether back wages should be awarded fully or only partially (and if so the percentage). That depends upon the facts and circumstances of each case. Any income received by the employee during the relevant period on account of alternative employment or business is a relevant factor to be taken note of while awarding back wages, in addition to the several factors mentioned in G.M.,Haryana Raodways vs *Ridhan Singh ((2005) 5 SCC 591 and U.P.Brassware Corpn., Ltd., vs Uday Narain Pandey (2006) 1 SCC 479.* Therefore, it is necessary for the employee to plead that he was not gainfully employed from the date of his termination. While an employee cannot be asked to prove the negative, he has to at least assert on oath that he was neither employed nor engaged in any gainful business or venture and that he did not have any income. Then the burden will shift to the employer. But there is, however, no obligation on the terminated employee to search for or secure alternative employment. Be that as it may."

The above reproduced portion of the judgment supports the case of the petitioner that he is entitled to back wages as not only that he was fully exonerated by the Labour Court but also that his plea that he was not gainfully employed has not been controverted.

For the aforementioned reasons, the writ petition is allowed. The award to the extent it has denied back wages to the petitioner is set aside and the petitioner is entitled to the back wages for the entire period between 24.12.1995 and 28.8.1997.

C.V.NAGARJUNA REDDY,J

Date:19.09.2007
mdaa

[1] (2007) 2 SCC 433